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STATUTES AND CONSTITUTIONS IN AN AGE OF COMMON LAW†

*Reed Dickerson**

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I. INTRODUCTION

We have in America a magnificent jurisprudence of common law, inherited in large part from England. What we do not have is a coherent jurisprudence of legal instruments. Is it any wonder that judges so often flounder when they confront a constitution, a statute, an ordinance, a regulation, or a private legal instrument?

By common-law standards, judges may be graded on what they ought to do, on what they say they do, or on what they in fact do. Legal realism has long used the third standard to counteract the potential for hypocrisy (or simple inaccuracy) in the second. Unfortunately, it has often been perverted into a comprehensive theory of law. The result is that concern for the third standard often preempts not only the second, but as much of the first as is not already preempted by the personal values of the judge. One of the unfortunate results, swollen by judicial naivete respecting language and meaning, has been to erode the cognitive integrity of legal instruments, upon which the effectiveness of human arrangements heavily depends. American jurisprudence is like a stool with one leg missing.

It took eighteen years of study and effort to supply, with only modest success, my own substitute "leg" for statutes. Eleven years later, a valued colleague, Professor Daniel O. Conkle, has challenged me to explain the possible relevance of *The Interpretation and Application of Statutes*¹ to the problems of constitutional interpretation and application. This I am happy to do, but my acceptance can be explained only by the arrogance that clothes my general ignorance of constitutional law.

II. THE GENERAL QUESTION AND THE GENERAL ANSWER

The general question is: Are the principles of interpreting and applying statutes helpful in interpreting and applying constitutions? The general answer is: Partly yes and partly no.

A. *A Preliminary Amplification: Some General Comments on the Similarities and Differences Between Statutes and Constitutions*

In the following foray into the jungles of taxonomy, I have relied heavily on interpolation and extrapolation fortified by a generous fund of constitutional naivete. In view of this shortcoming, I can only fall

1. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* (1975).

back on the plea that, at this stage, it is more important to formulate the right questions than it is to look for right answers. Because this is an exercise in conceptual and structural coherence rather than a mere description of what courts are in fact doing, the reader should not be dismayed by the absence of any attempt to evaluate or catalogue specific decisions. Which decisions are valid and which are not is not our immediate concern. A healthier separation of powers is.

The similarities of statutes and constitutions are easier to summarize than the differences. Both involve written communications by multiple authors to multiple audiences. Both represent attempts to control or condition the future. Both often require interpretation to determine their meaning. Both often require supplementation, much of which current legal convention also classes as "interpretation."

Because interpretation in the sense of determining meaning deals primarily with problems of communication, the communication problems of statutes and those of constitutions differ mostly in secondary matters of degree. This condition has been obscured by the indiscriminate scrambling of "interpretation" in the sense of ascertainment of meaning, where significant differences are few, and "interpretation" in the sense of assignment of meaning, where significant differences abound. It has been further obscured by modern constitutional theorists who, being preoccupied with judicial contributions to the social good, have neglected important principles of communication. The courts' cognitive function is usually taken for granted and only rarely adequately understood.

The underlying assumption of the following analysis is that the current hodge-podge of theories of constitutional interpretation and application can be unscrambled only if the distinction between the cognitive and creative,² which all modern legal thought at least impliedly accepts, is conscientiously adhered to. That the two kinds of "interpretation" smoothly merge into each other is no excuse for suppressing or ignoring their significant differences.³

2. On this difference, see R. DICKERSON, *supra* note 1, at ch. 3. The distinction between the cognitive and the creative is partly obscured by the heterogeneous terminology used to describe it (e.g., "law finding" v. "lawmaking"; "exegesis" v. "common law"; "interpretation" v. "application"; "originalist" v. "nonoriginalist"; "ascertainment of meaning" v. "assignment of meaning").

3. However difficult, the general distinction between the two types of "interpretation" is unavoidable, if for no other reason than that the two notions draw on radically different sources. Nor can the difficulty of drawing the line between them be legitimately reduced by arbitrarily shifting the cutting edge of cognition from probability of meaning to clarity of meaning. Even if the balance of probability favors an interpretation that is not "clearly found," it should not yield to "federal common law." In H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 770

Although the following analysis is concerned with constitutions generally, most of it is couched in terms of the federal Constitution, where the prevalent issues are more sharply drawn.

B. Extracting Meaning (The Cognitive Function)

1. Some Obstacles to Understanding

Some of the cognitive similarities between statutes and constitutions have been obscured by the differing terms in which comparable ideas have been couched and by the way comparable problems have been differently conceptualized. For instance, "liberal interpretation" and "strict interpretation" have been used for both statutes and constitutions but in bafflingly different senses. More specifically, "strict construction" has been used, in the case of statutes, in at least five different senses,⁴ but seems to refer mostly to interpretation that is unfriendly in the sense of ignoring the way in which literal meaning is normally conditioned by context. Here, the unfriendliness is to context, not to the literal meaning of the statute.

With the Constitution, on the other hand, "strict construction" currently refers (at least in liberal circles) to interpretation that is unfriendly in the sense that the meaning of the Constitution, literal or otherwise, is allowed to impede and even obstruct the meeting of current social need. Here, the unfriendliness is to social need, not to the literal meaning of the Constitution or to its context.

Comparable differences exist in the respective uses of "liberal interpretation."⁵ Indeed, an almost unmanageable Tower of Babel has arisen in each field. Recent contributions to this verbal confusion include labels such as "majoritarian" (i.e., legislative); "instrumental," "generative," "nonoriginalist," or "noninterpretive" interpretation (i.e., judicial lawmaking); "judicial finality" (i.e., judicial preemption); and "doctrines of clear statement" (i.e., strict construction in its most usual statutory sense). Some of these terms are not only superfluous but semantically inapt.

These and other unfortunate differences in language, together with unwarranted analogies based on a failure to recognize differences in the external legal contexts in which statutes and constitutions respectively operate, result because, without an accepted coherent the-

(2d ed. 1973), the authors' attempt to change the principles of meaning by fiat was as fatuous as the attempt to negate the force of implication in the Uniform Probate Act § 1-105.

4. See R. DICKERSON, *supra* note 1, at 206.

5. *Id.* at 211-12.

ory of statutory interpretation and application, the law lacks a satisfactory basis for recognizing pertinent similarities and differences. The ultimate irony is a widely professed judicial reverence for constitutional provisions so generously interpreted that they provide little or no appropriately disciplined guidance for meeting current social needs. The cynic may ask, how could recorded constitutional wisdom have so perfectly anticipated the future? The more significant question, however, is how can so much democratic wisdom be safely left to a democratically unresponsive and only modestly equipped judicial elite?

2. *Constitutions as Communications—Context and Beyond*

Let us consider some particular matters of communication. The first one is contextual background.

A constitution is not only a social contract but a set of guidelines for the future. Although assembled in accordance with tentatively accepted legal rules, its ultimate claim to legitimacy is its initial capacity to command acceptance from its constituency. Its secondary support is the judicial loyalty that it can continue to command for maintaining the internal integrity and rational growth of the general scheme, however imperfect, that appears to animate it. The ultimate support for a constitution is thus neither law nor ethics, but a general willingness to submit to it.⁶

These elements provide much of the external context⁷ for and condition the message that the Constitution provides as a communication. Otherwise, it is subject to the same considerations that apply to statutes and other legal communications. The elements that comprise external context for statutes include the following:

A large fund of tacit assumptions conditions the cognitive process. These assumptions include many rebuttable assumptions of fact that . . . are based on established tendencies. . . . For example, in a statute it is generally assumed that the draftsman used his words in their normal senses and that he meant what he said. . . . It is further assumed that the draftsman did not intend to contradict himself. . . . [I]t is [also] assumed that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably." . . . Finally, it is assumed that the draftsman

6. This is true also of legislation, but legislation has the additional support of the applicable constitution.

7. On external context, see R. DICKERSON, *supra* note 1, at 110 and Index.

did not include language unless it contributed to the ideas expressed.⁸

Although of varying strengths, these presumptions would seem to be equally applicable to constitutions, except that the statutorily weak third presumption (reasonableness) is undoubtedly stronger for constitutions (where immediate political concerns are less pervasive) than it is for statutes. There may also be presumptions, peculiar to constitutions, based on tacit assumptions of fact that are relevant to resolving uncertainties of constitutional meaning. One of these may have been the basis for Justice Marshall's views on the limited scope of constitutions in *McCulloch v. Maryland*.⁹ I leave this for qualified constitutional scholars to verify.

Justice and other ethical considerations are effective factors only so far as they are recognized or permitted by text and context or, contravening that, generated by the power structures in which the communicative thrusts of the Constitution are permitted to operate. That these structures may sometimes be inimical to a healthy constitution can hardly be doubted. The important point is that the desirability of a healthy constitution justifies a court in resisting (or correcting) a constitutionally uncongenial yielding to the raw power of social desirability; many social needs are more appropriately met by formal constitutional amendment.

3. *Problems Resulting From Not Understanding the Cognitive Function*

The most significant elements in a written communication are author, instrument, audience, and external context.¹⁰ Secondary elements include ulterior purpose,¹¹ the necessity and reliability of implication, and myriad other aspects that affect meaning. Most law trained people do not understand and cannot apply these elements in interpreting statutes and constitutions.

Most current legal literature is thus insensitive to the depth and subtlety of the cognitive function, takes it for granted, or assumes that anything that interferes with social need may be judicially brushed aside on the ground that, being a "living, growing" institution, a statute or constitution invites judicial remolding, thus providing an un-

8. Dickerson, *Obscene Telephone Calls: An Introduction to the Reading of Statutes*, 22 HARV. J. ON LEGIS. 173, 181 (1985) (citation omitted).

9. 17 U.S. (4 Wheat.) 415, 422 (1819). See *infra* text accompanying note 35.

10. Dickerson, *supra* note 8, at 181.

11. R. DICKERSON, *supra* note 1, at 87-88.

stinting welcome to social improvement. Even legal realism has been distorted to support the judicial remolding of legislative meaning as a legitimate substitute for legislative amendment, thus subverting text or context.

More typical is simple judicial and academic naivete about the workings of language and meaning. This is ironical, but hardly surprising. It is ironical, because law faces the most sophisticated problems of meaning of any intellectual discipline. It is hardly surprising, because American legal theory has never outgrown its preoccupation with case law, and legal education, in its devotion to advocacy and recently the stimulating processes of social reform, has consistently neglected the processes of creating and administering legal instruments.

On two recent occasions, I addressed the appellate judiciary of a different state on the interpretation of statutes. In the second instance, I asked, "Why *me*? You are the professionals; I am only a professor." The reply was, "We don't know what we're doing!" And, indeed, many judges do not.

Evidence of lawyers' general inability to grasp the elements of communication abounds. The most eloquent testimony to this lies in their frequent reliance on case law to support so-called rules for determining meaning, a practice that differs little from relying on case law to validate the law of gravity.

This deficiency, which fortunately undermines the legitimacy of intuited results less than it undermines their rationalization, is well illustrated by so-called "statutory construction" acts, which presume to regulate, among other things, the principles of extracting meaning.¹² Other oddities include the search for legislative intent as a guide to statutory meaning, which exactly reverses the more semiotically and constitutionally defensible search for statutory meaning as a guide to legislative intent.

Another result of the lack of communicative understanding is the widespread notion that lexicographical change can affect the meaning of existing statutes. Where lexicographical change happens to produce a meaning more congenial to a current social objective, the notion is highly appealing. The trouble is that lexicographical change usually results from forces only marginally subject to human control. Thus, permitting it to affect the handling of existing statutes is often

12. See *id.* at 270-76.

to substitute the blind forces of social drift¹³ for the considered views, however adequate, of a democratically selected body constitutionally authorized to affect the future. The textual integrity of a constitutionally authorized statute can only be preserved by adhering to the connotations it generated at the time of its enactment.¹⁴

4. *Evaluating the Similarities and Differences Between Statutes and Constitutions*

Except for the resolution of uncertainties of meaning, relying on the metaphor of a statute as a "living, growing" thing is thus highly risky.¹⁵ Fortunately, refusing to rely on it would not destroy a statute's capacity for accommodating many future, even unforeseen, developments. Because of its great generality, an act such as the Sherman Act¹⁶ need not change its meaning to accommodate the myriad exercises in judicial lawmaking that the Act in effect delegated to the courts. Even where delegated legislation ("rule-making power") is not involved, an honest appraisal of the connotations most plausibly attributed to a statute normally reveals a capacity to include new denotations and even new species. For instance, a statutory reference to "laundry equipment" can readily accommodate later models and even new devices for washing that could not have been envisioned at the time of enactment.¹⁷ Beyond that, however, legislative, rather than judicial, amendment is indicated.

The same principles of cognition would seem to apply to the interpretation of constitutions. The main difference lies in their higher incidence of generality and vagueness. With this greater built-in leeway, the need to turn to constitutional processes of amendment and the temptations for judges to amend by the fiction of "interpretation" are less pervasive with constitutions than with statutes.

Another noticeable difference between a statute and a constitution is that the emotive or rhetorical element, while normally minimal

13. For example, the source law, enacted in 1942, for § 1122, title 10, of the U.S. Code, enacted in 1956, referred to "the United Nations." See 10 U.S.C. § 1122 (1982). By the 1950's, when the military laws were being recodified, the term was being used generally to refer to the international organization that had been created in 1946. The codifiers signaled the change by substituting "the United Nations, as then constituted," referring to July 20, 1942, the date of original enactment.

14. R. DICKERSON, *supra* note 1, at 10, 125-31, 272-74.

15. See Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

16. 15 U.S.C. §§ 1-15 (1982).

17. R. DICKERSON, *supra* note 1, at 128; C. NUTTING & R. DICKERSON, *CASES AND MATERIALS ON LEGISLATION* 503-04 (1978).

in a statute, is likely to figure more heavily in a constitution. This is because a constitution has fewer external documentary and literary resources to sustain and animate it.¹⁸ However, the difference does not lessen the importance of the respects in which statutes and constitutions are similar, nor does it otherwise pose a significant problem in our current investigation.

Although judges' ability to intuit defensible statutory results compensates for much of their frequent inability to rationalize them, bad theory often compromises good results. This may be even truer in the context of interpreting constitutions. In either event, the interpretation of constitutions can be greatly benefited by an infusion of meaning theory in the same way, if not to the same degree, as statutes. The only constitutional theorists who can logically dispute this are the extremists who seem to believe that past language must never be allowed to impede current judicial efforts to cope with the present and the future.

5. *The Role of Constitutional History*

That constitutions are laden with a larger proportion of highly general and highly vague terms means only that in constitutions courts confront a correspondingly larger proportion of problems of uncertainty in the cognitive sense and problems of supplementation in the creative, lawmaking sense. This, in turn, produces a correspondingly greater occasion and incentive to explore the resources of "legislative" (that is, constitutional) history.¹⁹ At minimum, it lowers the threshold to the courts' lawmaking function in this context. Once this threshold is passed, there is no law-based objection to investigating constitutional history and relying on it.

The more intriguing question is whether there is reason to hesitate in using constitutional history as an aid to cognition. Here, it may be useful to distinguish between constitutional provisions that have resulted from the process of amendment mandated by the Constitution itself and those that were included in the Constitution as it was originally adopted. The former result from processes closely similar to the deliberative congressional process (less the requirement of

18. For example, a constitution lacks a context of companion statutes and common law rules and, I surmise, as strong a buttress of accessible "legislative" history.

19. For a discussion of the problems of relying on legislative history, see R. DICKERSON, *supra* note 1, at ch. 10; Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 HOFSTRA L. REV. 1125 (1983).

presidential approval and supplemented by the states with another layer of vicarious intent)²⁰ and, more important, within the context and thus under control of the Constitution itself (whatever that involves). The parallel with conventional federal legislation is close enough to suggest an analogy with legislation in general. This could be sufficient basis for comparable restraint on the constitutional cognitive process. On the other hand, the possible impropriety of relying on constitutional history may be only theoretical unless premature constitutional "interpretation" on this level (i.e., lawmaking) involves a significant risk of unfair surprise.²¹

Assuming that it sometimes does involve such a risk, the question may then arise as to whether the need for judicial self-restraint is equally strong for uncertainties of meaning in the original Constitution, which was the product not of an established legislature operating within the framework of a reigning constitution but of an ad hoc group, long since dispersed, that worked wholly outside the framework of the structure that it ultimately produced. Here, restraints could only consist of relevant principles of natural law (if any), any relevant moral consensus among the representatives of the participating states, the discipline of a shared objective, any relevant agreed-on terms of reference, or a generally reliable assumption by those states that the framers, like most authors, intended what their handiwork proclaimed. For me, this last assumption supports a reasonable effort to find meaning before resorting to "constitutional" history. Consequently, the strongest justification for ultimately consulting it lies in the original constitutional text.

From this analysis, I find it reasonable to conclude that the principles of cognition are, for the most part, the same for statutes and constitutions. In the next Section, we will consider to what extent the same is true of the creative function.

C. Adding Meaning (The Creative Function)

1. Preliminary Comment: Lawmaking Incidental to the Cognitive Function

To compare legitimate judicial lawmaking relating to statutes with that relating to constitutions is more complicated. Making the

20. In other words, amendment-ratifying states for the most part adopt the congressional intent.

21. See R. DICKERSON, *supra* note 1, at Index.

effort will help clarify the anatomy of defensible judicial activism and possibly define a healthier separation of powers.

First, we should dispose of the kind of judicial lawmaking that is purely incidental to the cognitive function.²² This is the kind of lawmaking that inheres in resolving an evenly balanced uncertainty or in turning the most probable factual meaning into a legal certainty. Although this constitutes technical "lawmaking," creativity, if any, remains minimal and no one can legitimately holler "unfair surprise!" Instead, our present concern is judicial supplementation unsupported by any net probability of meaning.

2. *Lawmaking that Supplements Meaning*

The judicial supplementation of statutes must, of course, be conducted consistently with the existing constitutional framework.²³ The basic restraint here is the reigning principle of separation of powers. Granting for the purposes of analysis a consequent doctrine of legislative supremacy would seem to imply the desirability of safeguarding the integrity of the applicable system of communication (including the exclusiveness of the statutory vehicle), which in turn would seem to imply that judicial supplementation should be deferred until the court has made a reasonable attempt to establish its legislative terms of reference.

Whether a corresponding framework conditions the supplementation of constitutions depends largely on whether we believe in a relevant body of natural law or legally compelling ethical considerations. If this is lacking, precedent may have some influence. Whether constitutional text is exclusive is debatable. The determining factor in the quest for a framework for supplementation is ultimately the *de facto* social and judicial support that the constitution concerned is able to muster. These factors provide a looser context of external restraint than the constitutional factors that condition legislation.

The most significant differences between the judicial supplementation of constitutions and the judicial supplementation of statutes lie in the respective judicial attitudes toward the constitutional status of judicial supplementation. But before we investigate these differences, we must return, briefly, to problems of meaning.

22. See *id.* at 22-28.

23. See *id.* at ch. 2.

3. *Correcting Judicial Misjudgments*

With statutes, authoritative judicial resolution of cognitive uncertainties is conventionally regarded as an embellishment that is fused with the statute that is being clarified. On this theory, it has been strongly argued that, once proclaimed (however inappropriately), a defective judicial clarification can be repaired only by act of the legislature.²⁴ The prevailing view, however, seems to be that what the courts can do they can undo if necessary to correct acknowledged judicial error.²⁵ "Error" in this context refers to errors of cognition.

Is there a constitutional parallel? Consider a constitutional provision whose meaning is vague. The court's function in resolving the uncertainty is to draw lines marking the outer reaches of meaning. Once this is accomplished, the declared meaning is presumably part of the Constitution. If it is, how may a judicial mistake in cognitive judgment be corrected? Certainly it may be corrected by the method of amendment prescribed by the Constitution. By-passing this, may the court correct its own misjudgment? The parallel with statutes seems clear: If a court may correct a cognitive misjudgment in the case of a statute, it would seem equally appropriate for it to correct a cognitive misjudgment in the case of the Constitution.

On the other hand, "interpretation" by judicial lawmaking (other than that incidental to clarifying the uncertain) involves judicial action only to supplement. Undoubtedly, a court may correct its own common law misjudgments. It also seems clear that a court may correct a judicial misjudgment involving a previous act of judicial lawmaking in supplementation of the Constitution.

A more intriguing question is whether Congress may correct what, let us assume, was a judicial misjudgment. Of course, it may not repeal a judicial interpretation in the cognitive sense, either in the case of a statute or, most certainly, in the case of the Constitution. This is simply a matter of the generally accepted constitutional separation of powers.²⁶

But suppose the court's misjudgment lies in the exercise of law-making power that the Constitution has in effect delegated to the courts. Suppose, for instance, that the Supreme Court believed that its rules concerning "unreasonable searches and seizures" were inor-

24. See *id.* at 252-55.

25. See *id.* For problems of retroactivity and avoidance of unfair surprise, see *id.* at 255-61.

26. For future purposes, Congress may, of course, amend the underlying statute.

dinately restrictive on enforcement efforts. The result, by hypothesis, not being prescribed by the Constitution, is the power of desirable supplementation exclusively so delegated? Suppose Congress disagrees with the substance of the judicial supplementation, or suppose the courts have not yet acted. What, if anything, may Congress do?

In some cases, the Constitution may provide the answer. What about section 5 of the fourteenth amendment, which empowers Congress to "enforce" it with appropriate legislation?²⁷ However, supplementary rules of "enforcement" might not include supplementary rules of substance.

Suppose no such power is expressed. Legislative supremacy applies to legislation in the field of statutes, but not to the exercise of the cognitive function of constitutional interpretation. The question is whether it applies to lawmaking in supplementation of constitutional provisions. Some years ago, Congress, prompted by "the inadequacy of judicial interpretation," contemplated legislation supplementing the constitutional provisions that provide the basis for the presidential veto,²⁸ but the action was not taken.

On the other hand, Congress may have taken such a step in the War Powers Resolution,²⁹ a joint resolution enacted in 1973. This was designed to clarify the allocation of responsibility between Congress and the President respecting undeclared war. In so doing, Congress invoked article I, section 8, of the Constitution, authorizing it to make "all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by the Constitution in the Government."³⁰ We may reasonably ask what the Resolution affirmed.

The relevant clause in section 8 is couched only in terms of the "Execution" of "Powers vested by the Constitution," that is, powers presumably otherwise described in the Constitution. It in no way suggests that this clause includes a power in Congress to define or redefine, or to extend or restrict, any such power. The Resolution, on the other hand, may not be confined to "execution." Its critical provision is section 2(c):

The constitutional powers of the President as Commander-in-Chief

27. U.S. CONST. amend. XIV, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

28. COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, THE VETO POWER OF THE PRESIDENT 39 (Comm. Print 1951) (C. Zinn, Law Revision Counsel).

29. Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1982)).

30. U.S. CONST. art. I, § 8, cl. 18.

to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.³¹

Why is this provision significant? It raises the question whether it derogates in any significant way from article II, section 2, designating the President as Commander-in-Chief of the armed forces.³² If so, it is, at least to that extent, unconstitutional. If not, the question is whether the provision, which would be comfortable in the Constitution, should be accorded the status of constitutional law. If not, the remaining question is whether Congress can on its own supplement constitutional law where supplementation does not involve mere "execution." (Filling a gap does not necessarily qualify as such.) So far as I know, the War Powers Resolution has been neither interpreted nor tested in court.

4. *Exclusiveness of the Courts' Power to Supplement the Constitution*

Do the courts have exclusive power to make supplementary constitutional law in such a case? As the question is so stated, the answer has to be yes. However, the more apt question is whether all lawmaking that supplements the Constitution is necessarily "constitutional law" and thus beyond the control of Congress. The judicial extrapolation of general constitutional principles not fully articulated in the text is presumably fit constitutional material. But what about the specifics involved in such judicial action?

With regard to pure supplementation of constitutional principles (a theoretically narrow field of constitutional common law), is it not appropriate to argue that, in what is essentially a legislative (polycentric) exercise, Congress should be as fully authorized as the courts to make law that supplements the Constitution and thus to enjoy legislative supremacy even in the constitutional context? I would exclude from this the kind of lawmaking involved in the clarification of otherwise insoluble uncertainties of ambiguity and vagueness, because these result from problems of cognition, which are the exclusive prov-

31. 50 U.S.C. § 1541(c) (1982).

32. U.S. CONST. art. II, § 2, cl. 1 provides in pertinent part: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States"

ince of the judiciary to resolve. If it disagrees strongly with the courts' resolution of such uncertainties, the legislature is, of course, free to initiate a formal constitutional amendment.

I believe that it must now be conceded that the federal courts have implied authority to fill out the existing general contours of the Constitution by interpolation and extrapolation, much of which can be justified, on the basis of implication or shared tacit assumptions, as a legitimate exercise of the cognitive function and some of which can be rationalized as a legitimate exercise of the creative function. I also believe that the results can be appropriately characterized as "constitution law" and thus invulnerable to congressional change.³³ That this involves judicial bootstrapping does not necessarily invalidate it. The inclusion of broad, basic, and constitutionally congenial exercises of the courts' creative function can be founded at least on acceptance by the existing power structure.

It is unfortunate, however, that a growing consensus, relying on the reasoning expressed in the preceding paragraph, believes that the federal courts have also assumed constitutional common-law authority, not only to create further "constitutional" law, but to create the kind of proliferation of constitutionally inspired principles that involves a degree of particularity inappropriate to the Constitution and one likely to engage the legitimate attention also of Congress.³⁴

As Chief Justice Marshall once told us, a constitution's nature "requires . . . that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."³⁵ This process, which he called "expounding," seems to straddle the line between interpretation as persuasive explication and "interpretive" creativity loosely disciplined by plausibility. However, the more critical line here is that between constitutional text as so "expounded" and judicial prescriptions more appropriate to "the prolixity of a legal code," with a status only of federal common law, an area presumably vulnerable to legislative supremacy.

The difference between Marshall's widely accepted view and re-

33. However, it would seem inappropriate to characterize the resultant rule or principle as part of "the Constitution" unless it is most plausibly derived from the Constitution's text and context. Thus, the concepts "the Constitution" and (federal) "constitutional law" are not necessarily coterminous.

34. For the comparable problem of implementing statutory purpose, see R. DICKERSON, *supra* note 1, at 250-51.

35. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 415, 422 (1819).

cent Supreme Court practice is that the latter has failed to draw an adequate line between what functionally belongs in a constitution and what functionally does not.³⁶ The problem is not one merely of constitutional aesthetics but of a functionally sound allocation of law-making power. Solving it calls for appropriate judicial restraint and ultimately a high level of judicial courage and integrity.

Recent developments confirm the (at least *de facto*) existence of an even broader field of constitutional lawmaking. A legal realist can legitimately assert, for example, that in addition to clarifying, shaping, or supplementing identifiable constitutional provisions, the courts are in fact creating new rights and duties that have no, or only the most tenuous, relation to constitutional text or context. Has the Constitution created, by implication or otherwise, a general power to promulgate additional constitutional provisions that, once promulgated, can be changed only by a judicial power to correct or by formal constitutional amendment? Or is this a judicial arrogation of political power under the implied guise of recognizing a natural-law fund of "human rights"?³⁷ Short of that, have the federal courts a general common-law authority not only to supplement statutes, but to make law on their own, subject only to constitutional restrictions and the curative power of legislation?

The growing tendency of federal courts to extend their Constitution-molding "interpretations" beyond those incidental to the normal operations of the common law process, which is "unicentric" (that is, focused in each instance on a specific factual situation), to include the polycentricity that has heretofore been the almost exclusive province of the legislature is unfortunate.³⁸ It is unfortunate because the

36. For example, compare *Miranda v. Arizona*, 384 U.S. 436 (1966) with *Roe v. Wade*, 410 U.S. 113 (1973). These cases illustrate the Court's chronic inability to handle the specifics of differentiating between the interpretative function of fixing the outer limits of meaning (i.e., coping with vagueness) and the lawmaking involved in implementing the very general. They also illustrate the Court's inability to articulate coherent principles governing the sharing of lawmaking functions between the courts and the legislature, including even the lawmaking that is incidental to cognition when it carries the Court into degrees of specificity unbecoming a constitution. Regarding such power sharing, *Miranda* makes better sense than *Roe*. Should the initial specific issue in *Roe*, not being persuasively anchored in constitutional text and context (or in science), be the exclusive province of a tiny group of jurists?

37. It is always possible, of course, that an otherwise unconstitutional arrogation of power may be engrafted on a constitution by the existing political and social power structure.

38. The difference between the "unicentric" and "polycentric" approaches was first pointed out, I believe, by Professor Lon Fuller. Although I am unable to pinpoint the occasion on which he used the term "polycentric," he nailed down the substantive point in his refutation of the "pointer" theory of meaning in L. FULLER, *THE MORALITY OF LAW* 84 (1964).

strength of the common law has always rested on insights drawn from the investigation of specific real-life situations. (Is this not the core of "justiciability"?)

In rationalizing specific results, there have always been, as Professor Karl N. Llewellyn used to say (at least in conversation), the "broad-rule boys" and the "narrow-rule boys." But broad-rule judges do not furnish a suitable precedent for recent ventures in judicial polycentricity, which may be defined as the laying down of a network of specific rules for kinds of situations not involved in the case at hand. Their kinship to harmless, severable dicta does not absolve them. In practical terms, courts are not adequately equipped in either available time or fact-gathering facilities to rationalize materially more than what they are specifically adjudicating.³⁹ For broader efforts, Brandeis briefs can serve only as tiny fingers in the dike.

39. Any lingering doubts about this would seem to have been persuasively resolved by Professor Kenneth Culp Davis. See Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1 (1986). However, Professor Davis' proposal of a judicial pipeline to resources comparable to those available to Congress (mainly the Congressional Research Service (CRS)), while having much surface appeal, needs a closer look.

Davis is on target in recognizing that current judicial staffs are ill-equipped to handle the facts needed for legislation (traditional judicial precautions against bias tend to insulate courts from many useful sources of information). But what is his proposed capability to consist of? Access confined to past congressional investigations would hardly meet judicial needs; courts would need to shape their own inquiries.

Davis may be overestimating the capacity and the usefulness of the CRS. In my years of drafting federal legislation, I found that the overwhelming bulk of legislative facts relied on by Congress was being generated in the first instance by the executive agencies, lobbyists, or ad hoc congressional hearings. I relied on CRS's predecessor only on several occasions; usually I went directly to the cognizant agency or lobbyist. Ironically, these are the sources of much of CRS's own information and, except for the lobbyists, they are already directly available to judicial staffs.

Another problem with Davis' proposal is that in most instances a high level of extra-legal sophistication is required even to conceptualize and frame the questions to be researched and to evaluate the results. Can the courts supply this expertise without materially increasing their individual staffs? For this purpose, a joint intermediate staff might be useful.

What about turn-around time? Congress can ordinarily take as much time as it needs. Can the courts live with comparably deliberate searches for facts needed for legislation without further complicating and delaying their principal responsibility of delivering decently prompt justice?

Davis' proposal has its best chance of succeeding if it is confined to supporting the lawmaking that inheres in adjudication, where the informational need lies largely in relating the matter at hand to contiguous or adjacent legal considerations, an exercise for which most appellate judicial staffs are already well equipped.

Unfortunately, I doubt that a judiciary so currently intrigued with making law would be willing to restrict itself to the lawmaking necessary to adjudicate specific legal issues and to the judicial legislation involved in creating rules of procedure for its own governance or securing due process of law. In such a climate, adopting Davis' suggestion might only exacerbate the time problem and difficulty of persuading courts to observe the difference, first suggested by the late Professor Edwin W. Patterson, between the judicial "lawmaking" incidental to adjudication and the judicial "legisla-

So far as I know, exercises in judicial polycentricity (other than the development of rules for internal housekeeping) appear to have originated in the Supreme Court's *Miranda v. Arizona*⁴⁰ decision. They have so far been confined largely to implementing the Constitution. But they would seem to be out of place in any common-law context, even one that serves broadly delegating legislation such as the Sherman Act or comparable constitutional clauses, that is not limited to procedural due process and other matters that are the special province of the courts. Even if courts could surmount their inherent limitations, the results should not be treated as part of the Constitution or as constitutional law.⁴¹

A counter consideration is that, even where the legislature has the greatly superior capability, political circumstances and the usually ponderous mechanics of motivating legislative action may leave at least a temporary void. It may be desirable to fill this void judicially with sub-constitutional guidance that the legislature is free to revise if it so desires. Assuming the threat of a serious intrusion on individual liberty, the point seems well taken. On the other hand, in areas other than those involving civil liberties there is good reason for caution, not only because of the courts' inherent limitations but because of the practical difficulties in motivating corrective legislative action. Indeed, even when legislative motivation is strong, countervailing political considerations often stand in the way.⁴² Inadequate judicial responses to social need, however tentative, thus tend to outlive their contemplated usefulness.

5. *The Separation of Powers*

The most important and most sensitive questions involving the Constitution are those relating to the allocation of powers among the several branches of government. Because these are presumably resolvable for the most part by reference to the text and context of the Constitution, the most knowledgeable and thus the most plausible branch to resolve such jurisdictional problems is the judicial branch. Unfortunately, a potentially serious conflict of interest arises in this situation. In a contested claim of legislative supremacy, where the

tion" involved in rulemaking and to stick, for the most part, to the former (which they cannot avoid).

40. 384 U.S. 436, 436-44 (1966).

41. Fortunately, no such claim was made in *Miranda*. See *id.* at 467.

42. See the comment on *Caminetti v. United States*, 242 U.S. 470 (1916), in R. DICKERSON, *supra* note 1, at 181.

court often has the raw power, rightly or wrongly, to resolve the matter in its own behalf, what instrumentality is available to secure the appropriate degree of judicial self-abnegation? Only the perceptiveness and professional integrity of the court, bolstered by any congenial sources of social or political power, unless the court goes so far astray as to warrant the appropriately ponderous procedure of a formal constitutional amendment. Unfortunately, this may be the Achilles' heel of the Constitution.

The most critical issue, therefore, is the extent to which judicial lawmaking in the context of the Constitution is to be considered as integrated with its text and context so as to be impervious to change except by formal amendment, judicial reconsideration, or de facto rejection by the social and political forces that otherwise sustain it. It seems unlikely that every delegation to the courts of the power to make law that is related to the total constitutional scene was intended by the architects of the Constitution to have the status of constitutional law, an approach that would unduly stunt the development of details that should remain also within the practical reach of Congress, and would enhance the power of judges willing to sacrifice constitutional means to social ends. Even persons who are preoccupied primarily with social goals should keep in mind that, for the most part, the polycentric prescriptions necessary for social fairness and progress are better served by the more comprehensive capabilities of the legislature.⁴³ At least Congress should not be frozen out or seriously handicapped in making such prescriptions.

To resolve the dilemma, I suggest that judicial clarification and expounding of meaning decently attributable to the text and context of the Constitution should be treated as part of the broad concept of "the Constitution," subject to correction or reform as already indicated. To the broader concept of "constitutional law," we should probably add the fruits of broad delegations of lawmaking authority, exemplified by at least the procedural requirements of "due process of law," which are within the peculiar orbit of our system of justice and thus best handled by the courts.

On the other hand, the creative and systematic supplementation of such matters beyond what is appropriate to a constitution or constitutional law should be treated (as it was in *Miranda*) as general lawmaking of the kind that is shared with the legislature and subject

43. See *supra* note 39.

to its supremacy. There is no legitimate room for judicial preemption here.⁴⁴ That the line between the two fields should be drawn by the courts provides the supreme test of their objectivity and professional integrity.

Even if we may assume a general judicial power to add protections ("civil rights") having the force and exclusivity of constitutional law, may we not also assume that this does not include authority to derogate from the great bulk of constitutional provisions read in context that are decently clear? Certainly, the Constitution does not consist wholly of very general and very vague provisions such as "due process," "equal protection," "full faith and credit," "establishment of religion," "unreasonable searches and seizures," or "privileges or immunities."⁴⁵

6. *The Criteria for Judicial Lawmaking*

So far, the discussion of the courts' power to supplement textual constitutional law with principles or rules of their own creation, whether enjoying constitutional exclusivity or not, has not addressed the important problem of determining the guidelines appropriate to creating judge-made law in this context. To ascertain the relevant structural context, I have thus far focused largely on the constitutional legitimacy of judicial supplementation and on integrating its results with the concept of "the Constitution" and supplementary "constitutional law" as a preemptive shield against direct attacks by Congress even in areas where legislative supremacy would otherwise appear to rule. We will now address the broader question, whether

44. A good survey here is Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

45. If there are "natural" laws (rules of conduct that inhere in "nature," with or without a theological basis) and if one of them were involved but had not been codified as part of the Constitution, should it not be recognized as having legal force independent of, and presumably superior to, any rule created by the Constitution? If so, would it not also be a basis for overriding any inconsistent Constitution-created rule? If so, parts of even the Constitution might be declared unconstitutional under this cosmic "Constitution"? And why not? Some current judicial behavior seems to imply that this indeed might be true. It seems more consistent to conclude that, while valid under some higher law or moral domain, such action would subvert the legal system to which the courts owe allegiance and from which it must thus be vulnerable to rebuke.

If, on the other hand, there are no natural laws, what is the basis for "constitutional rights" that are not attributable, under any conscientious application of the cognitive process, to the text and context of the Constitution? Is there any alternative to the explanation that courts have, consciously or unconsciously, assumed a raw power that can only be rationalized under a "realistic" jurisprudence, as authenticated by the participation or acquiescence of the cognizant sources of social power?

the criteria that are appropriate to judicial lawmaking in the context of statutes are also appropriate to judicial lawmaking in the context of the Constitution? I suggest that, to a very large extent, they are.

To help explain why this is so, let me list the broad purposes that are served by judicial creativity. One is to resolve uncertainties of meaning, caused by vagueness or ambiguity, that cannot be resolved by relying on the resources of cognition. A second is to discharge obligations imposed on courts by statute or constitution to implement broad purposes (a form of "delegated legislation"). Such purposes are inevitably couched in very general terms, usually attended by a degree of vagueness and sometimes even by ambiguity. A third purpose is to make the law needed to implement an otherwise inadequately implemented legislative or constitutional purpose or to exercise common-law authority outside the sweep of statutory or constitutional meaning in instances where analogy provides an appropriate guideline.

With these purposes in mind, it is easier to see how judicial lawmaking can best be handled.

The first kind of case is that in which the court makes law to resolve an otherwise invincible uncertainty of meaning. To enlarge on this, let me quote some relevant materials from chapter 13 of *The Interpretation and Application of Statutes*, with appropriate constitutional language substituted in brackets:⁴⁶

If it has been determined that, because of a persistent uncertainty, the textual and contextual resources of meaning are inadequate to provide an answer to the issues posed by the litigation, the court must attribute a meaning to the [constitution] that resolves the ambiguity or vagueness as it relates to the kind of situation involved in the case before it. In attributing such a meaning, what approach should the court adopt? The answer is not easy.

The alternative approaches to performing the creative function in such a situation would appear to be the following:

- (1) The court should adopt the rule that the original [authors] probably would have adopted had [they] dealt with the problem at the time they drafted the [constitution]
- (2) The court should adopt the rule that a reasonable [constitutional convention] would probably have adopted
- (3) [No counterpart].
- (4) The court should adopt the rule that a reasonable [current constitutional convention] would probably adopt. This would presumably,

46. See R. DICKERSON, *supra* note 1, at 242-48 (citations omitted).

but not necessarily, be the rule that best fits with . . . related elements in the legal order, determined as of the present time.

(5) The court should adopt what the court considers the preferable rule for the kind of situation before it, as determined without regard to [constitutional] intent or the related elements of the legal order, including the provision under consideration.

(6) [No counterpart].

....

Despite modern trends in judicial activism, the approach of unfettered judicial discretion should be rejected out of hand, so far as it disregards the relationship between the new judge-made rule and related law. Even if the court owes no deference to the [authors'] officially uncommunicated view, if any, . . . it owes fidelity to the coherence of the existing legal order. Only if there is no guidance, by interpolation, extrapolation, or otherwise, from the rest of the legal order, including the officially expressed views of the [authors] is the court justified in going it wholly on its own.

If this analysis is correct, the principle that cognition should precede creation should be supplemented by a second principle, which operates within the area of judicial lawmaking: Disciplined creation should precede free creation. Thus, before a court takes off on its own, it should first make certain that there is no alternative that fits better with the [constitution] and its related law than any other. There is often a determinably best alternative and, when there is, the court should respect it. Impatience with this step leads to judicial bootstrap pulling. . . . [I]t is a judicial responsibility that the court should try, as fully as possible, to discharge.

The second kind of case is that in which the court makes law to implement statutory or constitutional delegations of lawmaking authority⁴⁷ resulting from the very general.⁴⁸ Again, to expand on this, let me quote from *The Interpretation and Application of Statutes*, with appropriate constitutional language substituted in brackets:

The basic problem [here is] to evolve supplementary rules of law that not only produce fair and workable results, but also operate compatibly with the general thrust of the [constitution] read in the light of its proper context.

....

The creativity permitted by [constitutional] generality differs from that permitted by unresolvable [constitutional] uncertainty. The respec-

47. *Id.* at 242-47. My comments on the Sherman Act in this Article (*see supra* text accompanying notes 16-17) seem for the most part applicable also to the procedural aspects of the "due process of law" clause of the fourteenth amendment. Both require courts not so much to interpret the uncertain as to supplement the very general.

48. *See generally id.* at 51-53.

tive guidelines likewise differ. The court does not speculate on what the original [authors] would have done or what a reasonable current [constitutional convention] would do; nor does it proceed by projection, interpolation, or extrapolation. It simply tries to carry out what it determines to be the broad [constitutional] mandate by conceptualizing it at a sufficiently lower level of generality to permit the rationalization of results in specific cases. Although the cognizant [clause] is treated as directly applying, it makes its practical impact through a network of subsidiary rules devised by the courts⁴⁹

The third kind of case, in which the court makes common law within the context of the Constitution that lacks the status of constitutional law and, in many instances, any plausible relationship to its meaning, seems so generally murky that I feel unqualified to clarify it. Accordingly, I can only say that, so far as such authority exists, the principles suggested in *The Interpretation and Application of Statutes* for "furthering legislative purpose"⁵⁰ and "using analogy beyond the scope or purpose of statute,"⁵¹ seem both relevant and potentially helpful. Indeed, it is in this instance that judicial discretion reaches one of its highest peaks. If the comparable situation arises for state courts, which enjoy fuller authority to make common law, there is less reason to be tentative.

Although this analysis does not provide a mature, sophisticated, and complete set of guidelines for judicial lawmaking in the context of constitutions, it suggests what would seem to be a substantial improvement over the insufficiently self-disciplined exercises in judicial lawmaking that have been taking place in the service of social goals without adequate filtering, in appropriate cases, through the more adequate and more democratically oriented processes of the modern legislature.

III. CONCLUSION

These lines of inquiry, which I am unqualified to pursue further, deserve closer scrutiny. They involve no particular social orientation, being concerned mainly with our legal system's need for a healthier allocation of functions among the three main branches of government and its need, by this means, to reshape some judicial attitudes. More specifically, the system needs a clearer concept of what the Constitution consists of. It needs more functional concepts of what supple-

49. *Id.* at 241-42.

50. *Id.* at 250-51.

51. *Id.* at 251.

mentary constitutional law and what sub-constitutional implementation of constitutional purpose consists of and how much of either remains the exclusive province of the courts and how much of it is shared with the legislature and subject to its supremacy. Above all, it needs a more sophisticated understanding of the extra-legal principles of cognition as they bear on constitutional meaning. Then, maybe, we can develop a more functional, understandable, and manageable body of constitutional doctrine. We might even develop a more wholesome respect for an instrument that we purport to hallow but tend to subvert.